No. 77-1778

In the Supreme Court of the United States

OCTOBER TERM, 1978

MICHAEL EDWARD GUIFFRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that his conviction for bank larceny under 18 U.S.C. 2113(b) must fall because his culpable acts did not constitute common law larceny.[1]

Following a jury-waived trial upon stipulated facts in the United States District Court for the Northern District of Illinois, petitioner was convicted of taking and carrying away, with intent to steal, approximately $22,000 by presenting false checks to a federally insured bank, in

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[1]18 U.S.C. 2113(b) provides:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both * * *.

violation of 18 U.S.C. 2113(b). He was sentenced to six months' imprisonment to be followed by two and one half years of probation. The court of appeals affirmed (Pet. App.).

During June and July of 1976, petitioner deposited 23 checks which were stolen from the City of Chicago and which contained forged endorsements. The checks were deposited in three separate accounts at the Melrose Park National Bank. Petitioner thereafter withdrew the money from these accounts in varying sums. He conducted all of these transactions with the assistance of Deborah Baldassari, a teller, who knew the checks were stolen but cooperated with petitioner in return for $200 (Pet. App. 2).

1. Petitioner contends that since he did not commit common law larceny, the holding of the court below that he was nevertheless properly convicted under the bank larceny statute was error and deepened an already existing conflict among the circuits on this issue. But his basic premise is erroneous: petitioner's conduct did amount to common law larceny (Pet. App. 2-3).

Petitioner cashed all of the checks with the assistance of an employee of the bank who knew the truth. The case is thus critically different from that in which a teller is duped by a forged signature, a switched bank note, or an impersonation and, believing the transaction to be lawful, willingly consents to give possession of the bank's money to another. Here, the teller's knowledge that the checks were stolen deprived her of all right to give valid consent on behalf of the bank. From the earliest times such a scheme has been held to be a trespassory taking and both the teller and his cohort are guilty of larceny. See, generally, *The King* v. *Bazeley*, 2 Leach 835, 168 Eng. Rep. 517; Fletcher, *The Metamorphosis of Larceny*, 89 Harv. L. Rev. 469 (1976). Every circuit that has considered the issue has agreed that the taking of money from a bank with the assistance of a teller is both a

larceny at common law and a violation of 18 U.S.C. 2113(b). *United States* v. *Bowser*, 532 F. 2d 1318, 1320-1321 (C.A. 9). Accord, *United States* v. *Brown*, 455 F. 2d 1201 (C.A. 9), certiorari denied *sub nom. Payne* v. *United States*, 406 U.S. 960; *United States* v. *Pruitt*, 446 F. 2d 513 (C.A. 6); *Williams* v. *United States*, 402 F. 2d 258 (C.A. 5); *Rizzo* v. *United States*, 304 F. 2d 810 (C.A. 8). Indeed, the Ninth Circuit, upon which petitioner relies, distinguished its decision in *LeMasters* v. *United States*, 378 F. 2d 262 (C.A. 9), upon this ground (532 F. 2d at 1320-1321; footnotes omitted):

> But in turning over the bank's money to one obviously entitled to neither its benefits nor its possession, [the teller] was not representing the bank but was acting adversely to it by aiding in accomplishing a trespassory taking and carrying away of bank property.
>
> Perhaps from as early as *The Carrier's Case* in 1473, most common law courts would have thought the circumstances sufficient to establish the offense of larceny * * *. To establish that the gist of the present case is bank larceny pure and simple, resort need not be had to any expansion of the statute in question [18 U.S.C. 2113(b)] by reference to legislative history or general purpose. The authorities primarily relied upon by appellant * * * demonstrate the significant distinctions.
>
> In *LeMasters* the defendant was charged with bank larceny in claimed violation of § 2113(b) and with related offenses, as in the present case. However, in that case the facts in no way suggested a trespassory taking.

Since the offense admitted constitutes common law larceny, an act clearly falling within the prohibition of

Section 2113(b), there is no occasion for this Court to consider the allegedly conflicting dicta in several circuits that Section 2113(b) does not reach beyond common law offenses.

2. Petitioner also argues (Pet. 10-11) that the court of appeals acted improperly in remanding the case to the district court for the sole purpose of correcting the commitment order, which mischaracterized the offense as "robbery" rather than theft. Petitioner suggests that his sentence may have been affected by the misdesignation. As the court of appeals pointed out, however, a sentence of only six months belies the possibility of such prejudice. At all events, the proper remedy is for petitioner to bring a motion under Fed. R. Crim. P. 35 for the correction or reduction of sentence, so that the trial judge may have the opportunity to address the issue of whether he was affected by the misdesignation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1978.

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